

11 MAR 1971

MEMORANDUM FOR THE RECORD

SUBJECT: H.R. 3807, "Federal Executive Service"

STATINTL
STATINTL

1. In follow-up of an 11 February 1971 memorandum from the Director of Personnel to Col. White indicating that a detailed review of H.R. 3807 would be undertaken by OGC, OLC, and Personnel, [redacted] and I met with [redacted] [redacted] Office of Personnel, on 2 March 1971.

STATINTL

2. OLC's analysis of the possible impact of the bill on the Agency as contained in memoranda for the record dated 23 and 26 February was reviewed. It was concluded that (in addition to the current exemption from Section 1), exemptions from Section 2 and Section 3 would be necessary to assure that existing Agency authorities remain unimpaired. Specifically, this could be accomplished by adding two new subsections:

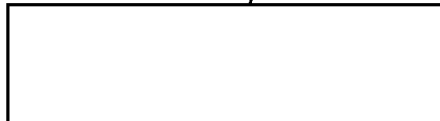
- (a) In Section 2 (between lines 7 and 8 on page 33)
 - (c) "This Section shall not apply to either the Central Intelligence Agency or its employees."
- (b) In Section 3 (at line 21, page 34) (c) "This Section shall not apply to the Central Intelligence Agency."

3. It was agreed that the next step would be to informally check both with the Civil Service Commission, probably Mr. Nicholas Oganovic, and the House Post Office and Civil Service Committee, John Martiny, Counsel, concerning such further exemption for the Agency. This course of action is consistent with the Director of Personnel's 11 February 1971 memorandum to Col. White.

STATINTL

4. Subsequently, [] responded that Mr. Fisher was reviewing the situation including OLC memoranda for the record referred to above. Further action by OLC with John Martiny should be held in abeyance pending further word from Mr. Fisher.

STATINTL



Assistant Legislative Counsel

Distribution:

Orig - Subject File

1 - OGC

1 - []

1 - OLC Chrono

OLC [] :cr

STATINTL

STATINTL

25X1

26 February 1971

MEMORANDUM FOR THE RECORD

SUBJECT: Proposed Federal Executive Service - Problem Analysis
(Draft Bill, February 1971)

REFERENCE: Memorandum for the Record, Same Subject, by

[REDACTED]

STATINTL

1. Federal Executive Service - Subchapter II

As pointed out in reference memorandum, the Agency and its employees are specifically excluded from Subchapter II, "Federal Executive Service" of Chapter 31 - "Authority for Employment," Title V, U. S. C.

a. Section 3132(1)(iv) specifically excludes "the Central Intelligence Agency" from the definition of "agency" for the purpose of Subchapter II.

b. Agency employees are excluded from the definition of "executive" in section 3132 (2) by virtue of the fact that for Subchapter II, they are not an employee of an agency.

c. Only one other provision in Subchapter II affects the Agency directly - Section 3134(d) encourages agencies excluded from the application of Subchapter II to adopt "such features of the program prescribed under this Subchapter as conditions of good administration warrant" and in this connection entitles such agencies to help from the Civil Service Commission.

In connection with the above provisions as well as the need for specific Agency exemption from other provisions of the bill as hereinafter discussed, it is important to note that:

a. The rationale used for excluding agencies including CIA from the Federal Executive Service is that excluded agencies have separate personnel systems for their executive-level employees which, by reason of the unique nature of their missions, are not suited for coverage under the Federal Executive Service (page 3, Sectional Analysis);

b. employees or groups of employees otherwise subject to Subchapter II may be excluded by regulations of the President in the interest of national security or foreign relations, or on the basis of a finding that the duties of the employee or group involve the performance of unique functions not readily adaptable to the purposes of this Subchapter. (Section 3132 (H))

2. Other Provisions

Although the Agency and its employees are specifically excluded from the proposed Subchapter II, "The Federal Executive Service", there are a number of other provisions in the draft bill which either through ambiguity may, or as a result of plain meaning would impair existing Agency statutory authorities (and impose new requirements and restrictions) with respect to Agency employees falling within the pay band GS-16 to level V of the Executive Schedule (presently \$28,129.00 - \$36,000.00).

a. Section 2(a)(2)(B): The meaning of the term "excepted employee" as used in this subparagraph is ambiguous. Assuming the worst case, that its meaning is equivalent to "excepted service" as defined in 5 U.S.C. 2103, the provisions of Section 2(a)(2)(B) would require the Agency either:

(1) to place certain employees under the Federal Employee Service, or

(2) to guarantee no change in tenure or loss of employment and job protection benefits.

At a minimum, this section conflicts with the Director's personnel management authority including the statutory authority under Section 102(c) of the National Security Act of 1947 to terminate the employment of Agency officers and employees within the pay band GS-16 through 18.

Moreover, the section grants such employees rights whose alleged violation is subject to review and determination by the Civil Service Commission under Section 2 (a)(3) in conflict with a number of exemptions for the Agency in current law.

b. Section 2b: Applicability of this section to the Agency and to Agency positions within the GS-16 through 18 pay band is clear, although its impact is somewhat ambiguous. Its purpose, insofar as Agency interest is involved, is to provide "the" pay fixing authority for incumbents of positions within the pay band GS-16 through 18 who are neither in the FES or an "agency program" under Section 3 of Subchapter II. This exclusive pay authority implies a repeal of current Agency authority to fix such pay. While one could question the effectiveness of the implied repealer, newer enactments generally are favored over older enactments in case of conflict.

As an aside, the pay table prescribed in this section appears to be frozen for the current authorized rates for GS-16 through 18 with no automatic provision for increase or retroactivity. The current authorized but unpaid increase for Step 5 of GS-17 and GS-18 is built in, however, and these rates apparently would be adjusted upward automatically with an appropriate increase in level V of the Executive Schedule beyond \$36,000.00.

c. Section 3: This Section appears to be fully applicable to Agency positions and presents the following serious problems:

(1) It would constitute the only authority for continuing a position within the pay band GS-16 through GS-18 and seeks by general repealer to repeal conflicting authority such as Section 8 of the Central Intelligence Agency Act of 1949. The language is not as precise as it should be. It appears to apply only to "conflicting authority" for the pay band GS-16 through 18, not complete repeal of the authority upon which the pay band is based.

-- The language is ambiguous as to whether new positions established after the effective date of the act are subject to this Section. It is clearly intended that they be covered.

-- Another ambiguity is whether the general repealer is effective in light of the lengthy "including but not limited to" provision which does not specifically refer to any CIA authority. But again the intention is clear.

(2) Section 3(b) imposes a requirement on the Agency for external reporting to the Civil Service Commission.

(3) Agency employees currently in the pay band GS-16 through GS-18:

(a) either are brought into the Federal Executive Service or into a similar program established by the Agency pursuant to Section 3431 of Subchapter II (The extent to which the Agency program would be subject to outside review and determination and its impact on other current Agency authority is fuzzy, a cause for concern by itself), or

(b) could continue to hold this position pursuant to Section 3 with a requirement on the Agency to report the fact to the Civil Service Commission. (The authority of Section 3 would atrophy as current incumbents leave their positions. The sole authority for establishing new positions and assigning incumbents to them would be an Agency program modeled after the FES.)

3. Conclusion: In view of the above, the Agency's existing authorities would be seriously impaired by the proposed bill. At a minimum, relief would require a complete exemption from Section 2 and 3 of the proposed bill, in addition to the exception in Section 1. STATINTL



Assistant Legislative Counsel

Distribution:

Original - Subject file

1 - OLC Chrono

OLC cr (26 February 1971)

25X1